ERRATA

1. Table of Contents, line 5, change "Overboard" to "Overbroad"; and line 32, change "Rpter." to "Rptr.".

2. Page 2, first full paragraph, line 4, change "and" to "an".

3. Page 4, first full paragraph, line 6, change "overboard" to "overbroad".

4. Page 9, third paragraph, line 2, after "conduct" and before "may" insert "which".

5. Page 10, second full paragraph, line 4, change "petitioner" to "petitioners"; line 5, change "petitioner's" to "petitioners'"; and line 9 after "criticize" and before "its" insert the following:
   "public officials and not with a state's power to dismiss".

6. Page 12, first full paragraph, line 3, delete "legislative".

7. Page 13, second full paragraph, line 20, change "ligitamate" to "legitimate".

8. Page 15, second full paragraph, line 11, change "Counsel" to "Council".

9. Page 21, third full paragraph, line 4, change "innocous" to "innocuous"; and line 6, change "Court" to "court".

10. Page 22, first full paragraph, line 1, change "overboard" to "overbroad"; and line 4, change "overboard" to "overbroad".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 325

JAMES A. WATTS and WALTER B. BLUE, *Petitioners*

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*

BRIEF OF RESPONDENT SEWARD SCHOOL BOARD

STATEMENT OF FACTS

The facts of this case are accurately and fully set forth in the majority opinion of the Supreme Court of Alaska, reported at 421 P.2d 586. Respondent adopts the recitation of facts contained there. Briefly summarized, the relevant facts are as follows.

Petitioners were teachers in Seward, Alaska, a village of less than 2,000 people. In March of 1960, the Seward School Board sent petitioners notices that they would not be retained for the next school year. In accordance with Alaska law then in effect[1] the notices contained bills of particulars setting forth the causes of non-retention.

Among other charges, the bills of particulars stated that petitioners had assisted in the printing and distribution of an open letter containing false statements against the superintendent of schools with the intent of injuring his professional standing and

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[1] S.L.A. 1957 Ch. 71 §1

destroying community and public confidence in the administration of the schools. The petitioner Watts was charged with taking part in and encouraging clandestine activities of teachers with the purpose of ousting the superintendent of schools. Petitioners were also charged with substantial non-compliance with the regulations of the Seward School Board relating to the filing of complaints and grievances against the administration and the school board.

Petitioners appealed their non-retention to the school board as they had a right to do under Alaska law.[2] Hearings were held before the Seward School Board. Petitioners appeared and were represented by counsel. Petitioners both admitted distributing and open letter to the Seward School Board. The open letter contained a list of ten alleged incidents which were stated to be "definitely detrimental to the morale of our teaching staff and the effectiveness of the local education system." The open letter accused the superintendent of the Seward Public Schools of misconduct ranging from "dictatorial treatment of teachers" to neglect of the music department. The open letter, dated May 18, demanded a confrontation with the school board on May 19. It contained a demand for "immediate, guaranteed, substantial improvement in its administrative policies . . ."

The open letter was distributed by mail to the general public in Seward. Transcript of Hearing of Seward School Board, November 1960, p. 41, 66; hereinafter "Tr". Petitioners admitted that many of the charges set forth in the open letter had never previously been brought to the attention of the superintendent (Tr. 76).

The petitioner Watts, in April of 1959, solicited support from teachers for a private move to oust the superintendent (Tr. 12, 21, 24, 297.)

The Seward School Board entered detailed findings. The charges of the superintendent's misconduct contained in the open letter were found, with one minor exception, to be false. The school board also found that petitioners were guilty of substantial noncompliance with the school board regulations in distributing the open letter before presenting the grievances and complaints which it contained to the superintendent.

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[2] S.L.A. 1957 Ch. 71 §2

SUMMARY OF ARGUMENT

Petitioners were nonretained for "immorality" according to the nonretention statute then in effect. "Immorality" was interpreted by the Alaska Supreme Court as a catch-all phrase serving the same purpose as phrases such as "good cause" or "unprofessional conduct."

A Statute which states that an employee may be dismissed for cause is not the kind of statute that is subject to the objection of overbreadth. There is no specific legislative judgment that a certain activity justifies the penalty of dismissal. Rather there is a delegation to an agency to judge appropriate cases for the imposition of penalties. It is the specific agency judgment that is reviewed on appeal not the statute itself.

The statute allowing dismissal for cause is not void for vagueness, because members of a profession must be charged with knowledge of what kinds of actions are unprofessional. Furthermore, it is impossible to list all specific acts which might constitute "good cause". Therefore a state has no alternative but to employ a dismissal-for-cause technique.

Petitioners' nonretention pursuant to the statute was valid, because their actions did constitute good cause. In reviewing an administrative decision such as the present one the standard to be used is whether there is evidence in the record to rationally justify a finding of good cause. Petitioners only challenge the existence of good cause by asserting that they had a constitutional right to engage in the activities for which they were dismissed. It is clear, however, from an examination of the cases involving specific regulations of conduct, that petitioners did not have a right to engage in solicitations of other employees on school time and to distribute an open letter to the public of Seward which contained many false and misleading statements. Since these activities could have been regulated and forbidden to public employees by specific statutes without constitutional objections, then these actions can also constitutionally form the basis of an adjudication of good cause.

Petitioners' dismissal must be sustained for the additional reason that they violated regulation E-7 of the Seward School Board. The regulation provided that grievances are to be submitted first to

the superintendent to allow him to act upon them, and then an appeal may be taken to the School Board. Petitioners violated the regulation by distributing an open letter simultaneously to the superintendent and the School Board. The open letter contained many grievances and complaints, none of which, with one possible exception, had previously been communicated to the superintendent. Petitioners' dismissal based on the violation of E-7 should therefore be sustained. The School Board's interest in having their employees' grievances go through channels before being taken to the public by means of strike or open letters, is not only a reasonable interest but is a compelling need.

Petitioners' constitutional objections to E-7 of vagueness and overbreadth should not be considered because they were not timely raised. In any case, the objections are without merit. E-7 is not vague; it clearly sets forth a simple procedure for processing grievances. Furthermore, the regulation was applied literally. The regulation is also not overboard. It is not true that the regulation covers some cases where the state interest does not justify the restrictions. Regulation E-7 could not be made narrower.

ARGUMENT

I. THE STATUTE UNDER WHICH PETITIONERS WERE NONRETAINED WAS NEITHER VAGUE NOR OVERBROAD.

Petitioners were non-retained under S.L.A. 1957, Ch 71, §2. At the time in question, tenure teachers could only be dismissed for cause.[3] "Cause" was defined as:

> (a) Incompetency which is defined as the inability or the unintentional or intentional failure to perform one's legitimate duties in a satisfactory manner; or (b) Immorality which is defined as conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect; (c) Substantial non-compliance with the school laws of the Territory or such regulations of the Territorial Board of Education or any other governmental agency as are applicable or of the employing school district; . . .

S.L.A. 1957, Ch. 71 §2.

The Alaska Supreme Court determined that immorality as defined in the statute was intended to be a catch-all, serving the same purpose as phrases such as "good cause", "unprofessional conduct", or "conduct unbecoming a teacher." *Watts v. Seward School Bd.*, 421 P.2d 586, 590 (Alaska 1966). This authoritive interpretation of the statute should be accepted by this court. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 285 (1961). Such dismissal-for-cause statutes are quite common and are employed as a technique by many states and the Federal Government. For example, an employee may be removed from the federal civil service "for such cause as will promote the efficiency of such service."[4] These phrases necessarily cover a broad range of conduct, because no statute could be framed to include with specificity all the particular acts which might render an employee unqualified to continue his employment. Before consideration of the issues of legitimate state

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[3] S.L.A. 1957, Ch. 71 §1 &

[4] 5 U.S.C.A. §7501(a) (1967) provides:

> An individual in the competetive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

See 5 U.S.C.A. §7512 (1967) (preference eligible employees) and see statutes cited in Bellan v. Board of Pub. Educ., 357 U.S. 399, 406 n.8 (1958) and accompanying text.

interests and protected civil liberties, it is of the utmost importance to note the kind of statute under which petitioners were non-retained and specifically petitioner's challenge that the statute was vague and overbroad.

A. The Statute Was Not The Kind of Statute That Would be Subject to the Objection of Overbreath.

In such dismissal-for-cause statutes no legislative judgment has been made that any particular action justifies the imposition of the penalty of dismissal. For example no judgment has been made that failure to sign an oath renders an employee unfit for employment. The legislature has not declared that a state's interest will be advanced by dismissing those employees who engage in a specified activity. Instead, in dismissal-for-cause statutes an agency has been entrusted with the task of finding whether a particular employee's actions constitute good cause for dismissal. Thus the decision that a state's interest will be advanced by the dismissal of an employee has been delegated and is to be made in a judicial fashion on a case by case basis.

Statutes which do contain a legislative judgment that a particular act renders an employee unfit, i.e., impose a penalty for the doing of an act, should be reviewed by different standards than statutes allowing dismissal for cause. In a case such as *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964) a county charter forbade all county employees from directly making or receiving any contributions to any political party.[5] The constitutional defect was clear. The erroneous legislative judgment had been made that a state interest would be advanced by denial of employment to all employees who contributed money for any political party or purpose whatsoever. A penalty had been imposed by the legislature on an overly broad basis. Any judicial or agency hearing the employee received would only involve the question of whether in fact the employee did the forbidden act. Thus, the only means the employee could have of seeking judicial review of the legislative judgment that his act should be penalized, would

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[5] No officer or employee of the county in the classified civil service shall directly or indirectly make, solicit, or receive or be in any manner concerned in making, soliciting, or receiving any assessment, subscription, or contribution for any political party or any political purpose whatsoever.
392 P.2d at 386.

be to attack the statute for overbreath.[6] By litigating this issue, the employee would be able to make sure that the legislative judgment would be applicable to his case and that benefits were not being denied him without the advancement of a state interest. To not allow a recipient of benefits this kind of judicial review before permitting a denial of his benefits, would in effect sanction a Bill of Attainder. See Comment: The Supreme Court's Bill of Attainder Doctrine: A Need For Clarification, 54 Cal. L. Rev. 212, 250 (1966).

In a case where employment can be denied for unprofessional conduct or as in the federal civil service "for such cause as will promote the efficiency of such service," 5 U.S.C.A. §7501 (a) (1967), the need for and type of judicial review is quite different. There is no legislative judgment that a penalty may be imposed or a public benefit may be denied for a particular reason. Rather, there is a delegation to an agency to judge appropriate cases for the imposition of penalties. Since there is no legislative judgment in the dismissal-for-cause statutes, *a fortiori* the legislative judgment cannot be overbroad, and the issue of overbreadth need not be considered on judicial review. In a dismissal-for-cause statute, an employee is directly given the opportunity to litigate whether what he did, in fact justifies the denial of employment to him. The judgment that the state's interest demands the dismissal of the employee is made specifically in each individual case. The task of judicial review of this kind of procedure is not to decide if the statute is overbroad, but is only to determine if there has been a valid delegation of power,[7] and if the adjudication made under the statute was correct, i.e., that it was not arbitrary, that it was in accordance with substantial evidence, and that the state's interests in the particular case warranted the denial of the benefit.

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[6] In United States v. Robel,—U.S.—.88 Sup. Ct. 419, 427 (1967) Justice Brennan (concurring) pointed to the fact that the defense plant worker received no opportunity "to prove that the statute's presumption that he is a security risk [because of membership in a Communist-action-organization] is invalid as applied to him."

[7] In Jordan v. State Bd. of Ins., 334 S.W.2d 278 280-81 (Tex. 1960) the Texas court upheld the use of the phrase "not worthy of the public confidence" as a standard by which insurance companies could be judged and their licenses revoked. The court held that the true constitutional test was whether the standard was certain enough to facilitate adequate judicial review. The court cited Davis, Adiminstrative Law Treatise, §2.03 (1959). This issue has not been raised in the present case.

B. The Statute Was Not Void For Vagueness.

In the few cases where a dismissal-for-cause statute has been attacked for vagueness it has been upheld. The question of vagueness, appears to be governed by *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958). In that case a teacher was dismissed under the disqualifying ground of "incompetency." His offending conduct was refusing to answer questions propounded by his superior in private concerning his possible association with communist groups. The teacher's contention that due process of law was violated by including his refusal to answer within the term "incompetency" was rejected by the Court. The court mentioned that the Pennsylvania statute under which he had been dismissed, "unlike those of many other states, contains no catch-all phrase, such as 'conduct unbecoming a teacher,' to cover disqualifying conduct not included within the more specific provisions." 357 U.S. at 406. By inference then, it would have been constitutionally permissible to have dismissed the teacher under a catch-all standard. The Court proceeded to note that the term "incompetency" had been broadly interpreted by the Pennsylvania Court and that its dictionary definition was not particularly prescriptive. Since this was so, the Court held, the extension of the term "incompetency" to include the teacher's refusal to answer was not inconsistent with the United States Constitution.

In *Board of Educ. v. Swan*, 41 Cal. 2d 546, 261 P.2d 261, 266 (1953), *cert. denied*, 347 U.S. 937 (1954) the Court rejected an attack on the standard "Unprofessional conduct" as being void for vagueness, with the following statement:

> As was said in the Goldsmith case, 66 Cal. App. at page 168, 225 P. at page 787: "the calling (of a teacher) is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail so numerous, that they are incapable of enumeration in any legislative enactment . . . the teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all these

things be provided for and offenses against them be particularly specified in a single statute?

While it is true that when one must guess what conduct may lose him his position, one may steer wider of the unlawful zone[8] and that the threat of sanctions may deter almost as much as the application of sanctions,[9] these considerations do not compel the result that a statute allowing dismissal for cause or unprofessional conduct is void for vagueness. As shown above, the necessity of such statutes have been recognized. It is impossible to accurately enumerate all possible grounds which could justify dismissal. Thus, the state has no alternative but to employ the dismissal-for-cause technique.

Second, members of the profession must be charged with general knowledge of what conduct is unprofessional or may constitute "cause". Unprofessional conduct like "good moral character", a condition to the practice of law, is not unconstitutionally uncertain merely because subjective factors are involved.[10] All employees, public or private, know they may be dismissed for cause, yet no one really knows exactly which acts may be considered sufficient cause. However, an employee is protected from arbitrary, irrational or discriminatory interpretation of "good cause" by the procedure of a fair hearing, notice of the charges and by general guidelines set by the ethical standards of his profession.[11]

Furthermore, the statute is not rendered any less valid by the fact that some conduct may be unprofessional involves otherwise protected speech activities. If an employee were dismissed for what was determined to be an exercise of his constitutional rights, it

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[8] Speiser v. Randall, 357 U.S. 513, 526 (1958).

[9] N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

[10] Schware v. Board of Bar Examiners, 353 U.S. 232, 248-49 (1957) (concurring opinion indicating "moral character" not too vague.)

[11] For example, the preamble to the Canons of Professional Ethics of the American Bar Association states in part:

> "No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

would not mean that the statute was unconstitutional, but only that his specific dismissal was without valid cause. Compare *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) with *Konigsberg v. State Bar of Calif.*, 366 U.S. 36 (1961).

In attacking the present statute for vagueness and overbreadth, petitioners have made a fundamental error. The only issue in the present case is whether the state's interest justified denial of employment to petitioners because of their specific actions. The statute which has been interpreted as a dismissal-for-cause statute, can not be attacked as overboard or vague;[12] only specific decisions made under the statute can be attacked on the basis of a lack of actual good cause.

II. PETITIONERS' NONRETENTION PURSUANT TO THE STATUTE WAS VALID.

A. The Appropriate Standard of Review is Whether There is Evidence in the Record Which Rationally Justifies a Finding of Good Cause.

This case involves an administrative adjudication that certain actions taken by petitioners constituted valid grounds for their nonretention as teachers. Because of the broad grounds of invalidity asserted by petitioner, it is important to note what issues are not presented. Although cited more than a dozen times in petitioner's brief, *New York Times v. Sullivan*, 376 U.S. 254 (1964) does not directly bear on the present case. *New York Times* was concerned with a state's power to enforce its defamation laws against those who criticize its own employees in furtherance of legitimate state interests. E.g. *Houston v. United States*, 297 F.2d 838, 841 (Ct. Cl. 1962). If a public employee made a personnel report on a public officer containing negligently false and defamatory statements, the employee may be shielded from a libel suit, but he certainly could be fired for incompetence.

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[12] This is not a case of a condition being attached to public employment, and for that reason Keyishian v. Board of Regents, 385 U.S. 589 (1967) is irrelevant. Also United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947) and Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964) are not directly relevant. In these cases, the issue of protecting political activity was raised in the context of reviewing a specific legislative restriction contained in a statute, in the present case there is no legislative condemnation of a particular activity.

In reviewing an administrative decision such as the present one, the standard to be used is whether there is evidence to rationally justify a finding that a dismissal was made for good cause. Cf. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36 (1961); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958); and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). In *Schware*, the state decision denying membership in the bar because of lack of moral character, was held to be a violation of due process because there was "no evidence in the record which rationally justifie[d] a finding that Schware was morally unfit to practice law." 353 U.S. at 246-47. In general, the standard for review of school board decisions on the nonretention of teachers is the same as the standard for the review of any agency decision. For example, in *Hunter v. Board of Educ.*, 265 Ky. 162, 96 S.W.2d 265, 269 (1936), the court stated that it would not review the wisdom of the teacher's removal but would overturn the agency's decision if it was arbitrary, corrupt, or made without competent evidence. *Appeal of Sullivan County Joint School Bd.*, 410 Pa. 222, 189 A2d 249, 251 (1963), states the same standard for review in similar terms:

> "[A] court of commons pleas should look to see only if there is a manifest abuse of discretion or an error of law on the part of the Superintendent . . .". This rule is especially appropriate where, as here the question involves the competency of a teacher. Not only does the Superintendent possess greater expertise for this difficult determination, but the legislature has assigned to him the very job of establishing the standards by which judgments of competency have to be made.

The issue of constitutional rights in the present case is raised only in the following context: if after a consideration of all relevant factors, petitioners had a constitutional right to do what they did, then it would be arbitrary and unlawful to deny them employment. Whether petitioners had or had not a constitutional right to do what they did is a conclusion, not a premise. It is the conclusion to be reached after weighing the state's interest in regulating the kind of conduct petitioners engaged in, against any restraint on their right to engage in the activity. It is misleading to state as petitioners do, that since citizens have a right to criticize the government, the activity is protected; and since the activity is protected, then petitioners cannot be fired for engaging in it. See Brief for Peti-

tioners, p. 26.[13] What must be decided is not the abstract question whether citizens have a right to criticize government. This case does not involve merely the state's relationship to its citizens as a soverign; for the relationship here is that of employer to employee. The question here is whether the Seward School Board had a legitimate interest in dismissing these teachers.

B. Petitioners' Dismissal was Justified by School Board interests Which Were Both Reasonable and Compelling.

In asserting the School Board's interest in regulating the kind of conduct that petitioners engaged in, it is helpful to examine cases which involve the review of a legislative statute which regulates specific conduct. In reviewing that kind of statute, vagueness and overbreadth are the issues, unlike the present case; however, in deciding a statute is overbroad courts usually set forth a narrower area of permissible governmental regulation. Logically, a specific adjudication, such as the present case, should be sustained, if it dismisses an employee for reasons which fall within an area of permissible regulation. If certain conduct constitutionally could be prohibited by statute for a public employee, then dismissal for the same conduct cannot be attacked on constitutional grounds if such dismissal is made by an agency under a dismissal-for-cause statute.

By the standards set forth in cases involving specific prohibitions, petitioners' non-retention was for reasons which fall within the area of permissible regulation. In *United Pub. Workers of America v. Mitchell,* 330 U.S. 75 (1947) this court noted in sustaining the Hatch Act.

> The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.

330 U.S. at 95. This court went on to hold that restrictions which rationally relate to legitimate governmental interests are permissible. It was recognized that political activities on the employer's premises and during working hours clearly justify restrictions, 330 U.S. at 95 n. 29, and further, that active participation in partisan political

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[13] Brief for Petitioners will hereinafter be cited as "Op.".

campaigns could be the subject of regulation. The interest being served by these restrictions, and which was recognized as legitimate, is the promotion of efficiency and integrity, and the maintenance of proper discipline in the public service. 330 U.S. at 96-97.

If this is a legitimate area of regulation and if the regulations of the Hatch Act were properly sustained as reasonably related to the legitimate interests, then petitioners' dismissal for cause, when the cause would come within the provisions of the Hatch Act, cannot be invalidated on constitutional grounds. If petitioners' actions could have been regulated, then petitioners can be dismissed for their actions under a dismissal-for-cause statute without raising a constitutional issue.

Some state courts have defined the area of permissible constitutional regulations by a standard more stringent than that set forth in *Mitchell*. See for example, *Minielly v. State*, 242 Ore. 490, 411 P.2d 69 (1966); *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964). In *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966) it was held that the interest of the state must be a "compelling" one to justify the imposition of restraints on political activities of public employees.

> [W]e hold that a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service; (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.

421 P.2d at 411. All of these cases recognize that the government has some legitimate interests as employer. Furthermore, the one interest recognized as ligitamate by each of the above cases, is the interest in preventing an employee from campaigning against his superior.

> No one can reasonably deny the need to limit some political activities such as the use of official influence to coerce political action, the solicitation of political contributions from fellow

> employees, and the pursuit of political purposes during those hours that the employee should be discharging the duties of his position. *A strong case, we think, can also be made for the view that permitting a public employee to run or campaign against his own superior has so disruptive an effect on the public service as to warrant restriction.*

Fort v. Civil Serv. Comm'n, 392 P.2d 385, 389 (Calif. 1964) (Emphasis added).

As stated before, if conduct can be regulated by statute, then it can be constitutionally made the grounds for dismissal under a dismissal-for-cause statute. On the facts of this case, petitioners' conduct falls within the unprotected area as defined either in *Mitchell* or by the Califorina court in *Fort* and *Bagley*.

The Alaska Supreme Court and the School Board found[14] that Petitioner Watts, acting in his individual capacity and not as a member of any group,[15] during school hours and on school premises (Tr. 12) attempted to solicit the support of Mr. and Mrs. Frampton, two fellow teachers, in his attempt to oust the superintendent, Mr. Fabricius. Both teachers refused to support Watts, and Mrs. Frampton testified that she was "completely shocked" at the request. (Tr. 21) Watts also solicited teacher Monty Richardson (Tr. 24) and made representations during school hours to another teacher, E. G. Nagel, that "if it was the last thing they would do, they would get the superintendent." (Tr. 397). Thus, the record clearly shows that Mr. Watts made repeated efforts to solicit the support of his fellow employees to join a political campaign to oust their superintendent.

In *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947) this court reaffirmed the principle set forth in *Ex parte Curtis*, 106 U.S. 371 (1882) that public employees do not have a right to solicit funds from other public employees for political purposes. It was also recognized in *Mitchell* that "political contributions of energy" stand on an equal footing with contributions

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[14] Petitioners have not specifically argued that any of these factual findings are unsupported by the record.

[15] Watts v. Seward School Bd., 421 P.2d 586, 597-98 (Alaska 1966) Tr. 23, 24

of money. 330 U.S. at 98. Based on the *Mitchell* case, the conclusion is inescapable that petitioner Watt's solicitations of support from his fellow employees fall squarely within the area where the individual's rights as employee and citizen do not outweigh the government's interest as employer.

The court has recognized that there is a deep conviction "that an actively partisan government personnel threatens good administration." *Ibid.* There cannot be harmony and efficiency in an administration in which the employees are forced to choose sides and in which fear exists that political position rather than merit may determine the course of one's career. For these reasons, it was held in *Mitchell* that active participation in political campaigns could be forbidden to public employees.

The distribution to the public at large of the "open letter" by both petitioners was exactly the kind of activity which was recognized in *Mitchell* as a disruptive practice which should be forbidden to public employees. It is true that the publishing of the open letter did not involve a political party *per se*. However, in a small community such as Seward and in a school system of only 30 teachers (Tr. 126) the disruptive result is the same. Instead of working through proper channels, petitioners took their grievances to the public, thus forcing other employees and the citizenry into two camps. Watts admitted he did not think of appealing to the City Counsel or the State Board of Education for help in remedying the grievances, (Tr. 85) nor did he first present the grievances to Superintendent Fabricius (Tr. 76). Mr. Blue stated that there had been friction between the Board and the teachers and that the Board was attempting to implement a program of better discipline among the teachers (Tr. 307-8). It is against this background of a troubled relationship between employer and employee that the rash action of petitioners must be viewed. Mr. Swick, who also participated in the publication of the letter, stated that the purpose of the letter was to stimulate public reaction, short of a recall election, to bring pressure to bear on the School Board to take the steps outlined in the letter (Tr. 284). Since the effort failed to coerce the Board, a recall election was the next step. This, too, failed.

Petitioners were not merely expressing their views on a subject of general concern. They were attempting to motivate a com-

munity to support them in their conflict with their employer. They were instigating a local political campaign against their own superiors, which is at least as disruptive an activity as participating in party politics while in the Federal Civil Service.[16] There can be no question but that the conduct of petitioners in publishing the open letter was within the area of permissible regulation as set forth in *Mitchell.*

It is equally clear that the conduct of Petitioners also falls within the narrower area of permissible regulation as set forth in *Fort v. Civil Serv. Comm'n, supra,* and *Bagley v. Washington Township Hosp. Dist., supra.* While these cases seem to use a more restrictive test than earlier cases, they indicate the facts of the earlier cases would meet their more restrictive test. For example, in *Fort* it was recognized that solicitation of political contributions from fellow employees *(Ex parte Curtis, supra)* could constitutionally be restricted. *Fort* also stated that pursuit of political purposes during working hours was unprotected, and that an employee should not be permitted to campaign against his superiors. Since as has been shown petitioners did just exactly what was described as unprotected in *Fort,* the facts of the case also place it within the narrower area of permissible regulation defined in the state cases, and hence, the adjudication that petitioners' actions were good cause for dismissal cannot be attacked on constitutional grounds.

Petitioners admit, as they must, that "the right to criticize public officials and to associate for the purpose of ousting them peacefully" is not absolute but can be outweighed by state interests. (Op. 29). However, in assessing what state interests might outweigh First Amendment rights, petitioners make the following claims:

1) It is irrelevant that almost all of their allegations in the open letter were found to be false, because such statements have a qualified privilege, (Op. 30).

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[16] This court has recently pointed out that the area of legitimate governmental concern is far wider when it is conduct that is sought to be regulated and only secondarily "pure speech." Walker v. City of Birmingham, 388 U.S. 307 (1967) citing Cox. v. Louisiana, 379 U.S. 536, 555, (1965) as follows:

> We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford those who communicate ideas by pure speech.

2) Watt's solicitation of the Framptons could not bring discredit on him because it is a citizen's duty to criticize (Op. 32).

3) The solicitation could not discredit the teaching profession because that would be a libel on government which can't be punished (Op. 34).

4) It is irrelevant that the letter was arbitrary and high-handed because the "constitution protects expression and association without regard to the truth, popularity or social utility of the ideas or beliefs which are offered." (Op. 34).

It can be seen that in making these claims, petitioners have not in the slightest degree concerned themselves with weighting the interest of the government as employer against the rights of individuals who are government employees. Petitioners have instead, simply recited the same general cases which show that in other contexts and when other interests are at stake, citizens should not be penalized for expressing their opinions. Petitioners are not being sued for libel. The issue is whether the School Board must continue to employ them. Respondent believes that teachers who circulate falacious and inflamatory open letters to the public at large, without first allowing their employer an opportunity to explain, have demonstrated their unfitness to be teachers.

Petitioners do acknowledge "that the morale and discipline of the public service are among those interests which may require an accomodation between legislative power and individual exercise of First Amendment rights." (Op 36) Petitioners suggest that the appropriate test for deciding when the morale and discipline of public employees requires a restriction of their personal liberties, is the clear and present danger test used in *Wood v. Georgia*, 370 U.S. 375 (1962) which involved the punishment of a sheriff for contempt because he criticized in a press release a ruling of a local court. *Wood* is not helpful in analyzing the present case. In *Wood*, this Court found that no allegation had been made that the sheriff's position, as sheriff, related to the harm his statements could produce, and that there was no question of the performance of his duties as sheriff. 370 U.S. at 393. The sheriff was being punished for the mere expression of his views as any other citizen might be subject to the contempt power. There was no special employer-employee relationship in *Wood* as there is in this case.

There was no element of conduct as opposed to "pure speech" as there is in the present case. Most important the state interests to be protected are much stronger in the present case where the state's interest as employer in maintaining the discipline and effectiveness of public employees has been admitted to be a compelling one.

III. PETITIONERS' NON-RETENTION FOR SUBSTANTIAL NON-COMPLIANCE WITH SCHOOL BOARD REGULATIONS E-7 WAS VALID

Petitioners' teaching contracts were not renewed because, among other reasons, they substantially failed to comply with Seward School Board Regulation E-7. That regulation states:

> Grievances, complaints and communications from employees shall be submitted to the Board through the Superintendent. Any employee, or group of employees, may at any time appeal to the Board.

All teachers were given copies of the regulations of the board; petitioners admitted they were familiar with regulation E-7. (Tr. 14, 66). The Supreme Court of Alaska noted that the regulation required that grievances "should be submitted to the Board through the Superintendent. It provided a right of appeal from the Superintendent to the Board." *Watt's v. Seward School Bd.*, 421 P2d 586, 601 (Alaska 1966). Petitioners violated this regulation by participating in the preparation and simultaneous distribution of an open letter to the superintendent and members of the Seward School Board. 421 P.2d at 601. The open letter contained many grievances and complaints, none of which, with one possible exception, had previously been communicated to the Superintendent. 421 P.2d at 601; Tr. 121.

In sustaining the Seward School Board's conclusion that petitioners were guilty of substantial non-compliance with Board Regulation E-7, the Supreme Court of Alaska noted that not only had a substantial violation of the regulation taken place, but the purpose of the regulation, supplying an orderly process for deciding grievances, had been subverted by petitioners' conduct.

> The factual basis for the charges could have been verified by appellants if they had taken the time to do so. Appellants

> admittedly ignored established democratic procedure for obtaining redress. Instead, they attempted to arouse and inflame the public against the Superintendent and the School Board on charges which were largely untrue. They chose to attempt to substitute the mass meeting for the orderly process of hearing and appeal.

421 P.2d at 607

The regulation does not, as petitioners suggest, conflict with regulation E-9 which provides that copies of communications addressed to the Superintendent may be sent to the School Board. The plan envisaged by these regulations is that grievances are to be submitted first to the Superintendent to allow him to act upon them, although copies can be sent to the Board at the same time. The Board is only to *act* on appeal from the decision of the Superintendent. The open letter was addressed to the School Board, not the Superintendent. The letter's purpose was to force the Board to act directly and within 24 hours on matters which the Superintendent had not considered. Thus, the letter was indeed a violation of E-7.

A need for regulations which define and govern grievance procedure is not unique to the Seward School system, but is widely recognized as essential to orderly school administration. Even in the absence of a specific statute or regulation, an Illinois court said:

> There can be no doubt that if a teacher is aware of a censorable infraction of interscholastic athletic regulations by his school, he should seek to correct it. However, promotion of the best interest of his school dictates that he would first call it to the attention of the coaches and of his principal or superintendent of his school, and, failing action there, call it to the attention of the Board of Education, and then, if necessary, make a formal protest or report to the proper officials of the Illinois State High School Athletic Association.

Jepsen v. Board of Educ., 19 Ill. App. 2d 204, 153 N.E.2d 417, 420 (1958). In *Jepsen* the failure of a teacher to follow orderly channels in processing his grievance was held to be sufficient cause for his dismissal even in the absence of a regulation setting forth the specific procedure to be followed.

Petitioners have stated that the interest of the School Board in maintaining an orderly grievance procedure is "truly inconsequental", (Op. 35), and that public officials should not be able to impose "vows of silence to be observed on pain of discharge." (Op. 36) An employer's interest in having employee grievances go through chanels before being taken to the public by means of strike or "open letters", is not only a reasonable interest, but is a compelling need. What separates democracy from mob rule is the existence of procedural means for orderly change.

Petitioners have not contested the fact that their open letter of May 18, 1959, to members of the Seward School Board and the superintendent was in direct violation of the policy and outlined procedure of regulation E-7. it is a well-established principle that this Court will not disturb state court judgments which rest on independent and adequate grounds, even where these judgments also decide Federal questions. *Henry v. Mississippi,* 379 U.S. 443, 446 (1965.) *Wolfe v. North Carolina,* 364 U.S. 177 (1960.) Petitioners' noncompliance with regulation E-7 is an independent and sufficient state ground for the decision to non-retain petitioners; for that reason, it should not be disturbed.

Petitioners have also raised constitutional objections, vagueness and overbreadth, to Regulation E-7. Op. 45. These objections were first raised in a petition for rehearing to the Alaska Supreme Court, 423 P.2d 678 (Alaska 1967) after that court made its second decision, 421 P. 2d 586 (Alaska 1966). The Alaska Court refused the rehearing and stated.

> This court has not overlooked or failed to consider any question presented to it. The fact is that at no time during the six years this case has been in existence has it ever been urged, either in the administrative tribunals or courts, that there were any constitutional questions related to the issue of the validity and application of Regulation E-7.

423 P. 2d at 678. The raising of the constitutional issues on rehearing was held to violate two established procedural rules of the Supreme Court of Alaska. One, the court will not consider matters on appeal which were not first presented to the lower courts. [17]

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[17] Sanuita v. Common Laborers' Union, 402 P.2d 199, 201 (Alaska 1965) Pollastrine v. Severance, 375 P.2d 528, 531 (Alaska 1962).

Two, the court will not consider on appeal matters which have not been presented in compliance with its rules, which require a statement of points on appeal, and which require the appeal brief to list the questions presented for review, and specifications of error. [18]

Since petitioners' constitutional objections were not properly raised according to State procedure, they should not be considered in this court. The importance of raising constitutional questions "in due time" and in accordance with state procedure was discussed by Chief Justice Stone in *Yakus v. United States*, 321 U.S. 414, 444-45 (1944):

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . . Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of the State of California, supra, 274 U.S. at page 380.

In as much as Petitioners have waited six years before asserting their constitutional objections to E-7 and the issues were never properly before the state courts, this Court should refuse to consider them.

Moreover, the supposed constitutional objections to regulation E-7 are completely insubstantial. It is difficult to understand petitioners claim that the regulations's interpretation was a "grotesque transformation of its innocous language" because no one could know it would affect "the rights of teachers to communicate with the public." Op 46. The difficulty arises because the Court did not find that E-7 was violated because of the distribution of the open letter to the public. The violation occurred because the letter was sent to the School Board demanding their immediate action without first submitting it to the superintendent. It was not sub-

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[18] Rules of the Supreme Court of Alaska 9(e), 11(a)(5), (6), See, for example, Parks v. Brown, 368 P.2d 220 (Alaska 1962).

mitted through the superintendent to the Board.[19] In fact, the regulation was interpreted literally.

Petitioners also claim that Regulation E-7 is overboard because it requires all grievances no matter how genuine or immediate to be submitted to the School Board before being brought to the public attention. In order to be overboard, a statute must regulate some instances of activities which are protected from regulation. Petitioners point to no instance when the right to immediate public disclosure would be protected from what is essentially a regulation of time, manner and place. In fact, it is hard to imagine how a regulation such as E-7 could be made narrower. Are petitioners suggesting the regulation should only cover unimportant grievances? Such a regulation could not be made to work. Petitioners can not expect employees with grievances to admit that their complaints are not genuine or immediate.

CONCLUSION

For the foregoing reasons and on the strength of the foregoing authorities, this Court should sustain the decision of the Alaska Supreme Court.

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[19] Watts v. Seward School Bd., 421 P.2d 586, 600 (Alaska 1966) (School Board findings 9 and 10.)